QUESTION PRESENTED

Whether petitioner's death benefit plan was a plan deferring the receipt of compensation within the meaning of Section 404(a)(5) of the Internal Revenue Code, so that the deductions allowable to petitioner under that plan are limited to the payments actually made.

STATUTES AND REGULATIONS INVOLVED

Pertinent statutory provisions are set forth in Appendix C to the petition (Pet. App. 31–32). Pertinent Treasury Regulations on Income Tax (1954 Code) are set forth in the Appendix, *infra*, pp. 7–8.

STATEMENT

In March, 1955, petitioner experienced a labor dispute with its union employees. To help settle the dispute, petitioner agreed in writing to provide, at retirement, life insurance or the right to death benefits of $1,000, to all employees who worked for petitioner until their retirement date. (R. 36a–37a.)[1] In September, 1955, pursuant to that agreement, petitioner's board of directors approved a death benefit plan for all full-time regular employees (R. 37a, 987e), which remained in effect through 1955, 1956 and 1957, the years here in suit (R. 37a). As employees entitled to death benefits under the plan retired, each was given a death benefit certificate evidencing petitioner's obligation to pay his beneficiaries $1,000 upon his death (R. 38a, 1034e). During the years in suit, petitioner

[1] "R." references are to the separately bound record appendix filed in the court below.

delivered 240 such certificates and claimed a deduction of $239,800 for the face amount thereof (R. 38a), without regard to the amounts actually paid thereunder.

The government contended that the death benefits constituted deferred compensation within the coverage of Section 404(a) of the Internal Revenue Code, and that deductions were therefore allowable, as provided by Section 404(a)(5), only in the amount actually paid out pursuant to the certificates. The district court rejected the government's contention (Pet. App. 23), and the court of appeals reversed (Pet. App. 26–30).

ARGUMENT

The decision below is correct. There is no conflict of decisions or any other ground for further review.

1. Section 404(a) provides in general that accrued liability to pay compensation under deferred payment plans which satisfy other requirements of the Internal Revenue Code shall be deductible subject to the limitations of Section 404. As applicable to the years in suit, Section 404(a)(5) permits deductions under plans of the type here involved only "[i]n the taxable year when [compensation is] paid." See *New York Seven-up Bottling Co.* v. *Commissioner*, 50 T.C. 391; *New York Post Corp.* v. *Commissioner*, 40 T.C. 882; *Seavey & Flarsheim Brokerage Co.* v. *Commissioner*, 41 B.T.A. 198.

Petitioner does not directly question the reasoning by which the court below concluded that its death benefit plan constituted deferred compensation and

therefore was covered by Section 404(a). Rather, it suggests (Pet. 4, 5) that the result reached by the court of appeals represents an unwarranted judicial erosion of accrual accounting principles. But the court below (and the others which have reached the same result) did not overlook the general rules of accrual accounting to which petitioner refers. It construed Section 404(a) as an express legislative exception to those rules for death benefit plans. There can be no doubt that Congress has the authority to create such an exception, and that it did so in Section 404(a). Petitioner's reliance on the general rules thus is misplaced.

2. Petitioner also argues (Pet. 5–6) that amendments to Section 404(a)(5) made by the Tax Reform Act of 1969, P.L. 91–172, 83 Stat. 487, Section 321(b)(3), would entirely deny petitioner a deduction for benefits paid under its death benefit plan. From this premise, petitioner seeks to draw the conclusion that Congress never intended that Section 404(a)(5) should apply to such death benefit plans (Pet. 6). This argument assumes, with no support in the legislative history of the recent amendment to Section 404(a), that the 91st Congress gave some specific consideration to the deductibility of accruals under death benefit plans, or to the coverage *vel non* of such plans under Section 404(a) in pre-1969 years.[2]

[2] This Court has questioned the weight to be given to the views of a later Congress as to the proper construction of a measure enacted by an earlier Congress. See, *e.g.*, *United States* v. *Price*, 361 U.S. 304, 313.

Whether the new language of Section 404(a)(5), which limits deductions to amounts includible in the gross income of employees, will be judicially—or even administratively—construed and applied so as to have the effect asserted by petitioner remains to be determined.[3] At all events, that language is irrelevant with respect to taxable years—including those here in issue—which preceded the effective date of the amendments to Section 404(a)(5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] The issue is presently under study by the Treasury Department.

APPENDIX

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§ 1.404(a)–1 *Contributions of an employer to an employees' trust or annuity plan and compensation under a deferred payment plan; general rule.*

(a)(1) Section 404(a) prescribes limitations upon deductions for amounts contributed by an employer under a pension, annuity, stock bonus, or profit-sharing plan, or under any plan of deferred compensation. It is immaterial whether the plan covers present employees only, or present and former employees, or only former employees. Section 404(a) also governs the deductibility of unfunded pensions and death benefits paid directly to former employees or their beneficiaries (see § 1.404(a)–12). For taxable years beginning after 1962, certain self-employed individuals may be covered by pension, annuity, or profit-sharing plans. For the rules relating to the deduction of contributions on behalf of such individuals, see paragraph (a)(2) of § 1.404(a)–8 and § 1.404(e)–1.

* * * * * *

§ 1.404(a)–12 *Contributions of an employer under a plan that does not meet the requirements of section 401(a); application of section 404(a)(5).*

Section 404(a)(5) covers all cases for which deductions are allowable under section 404(a) but not allowable under paragraph (1), (2), 3), (4), or (7) of such section. No deduction is allowable under section 404(a)(5) for any contribution paid or accrued by an employer under